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SUPREME COURT

No. 5671

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

ALBERT C. DROSTE,
Plaintiff-Appellant,
vs.

OTTO KERNER, Governor of the State of Illinois, WILLIAM CHAMBERLAIN, Secretary of State of the State of Illinois, and JAMES H. GATELY, WILLIAM L. McFETRIDGE, JACOB M. ARVEY, JOHN LEVIN and JOSEPH L. GILL, Commissioners of the Chicago Park District, a municipal corporation, and UNITED STATES STEEL CORPORATION, Intervenor,
Defendants-Appellees.

On Appeal From The Supreme Court of Illinois.

MOTION TO DISMISS ON BEHALF OF UNITED STATES STEEL CORPORATION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 671

ALBERT C. DROSTE,

Plaintiff-Appellant,

vs.

OTTO KERNER, Governor of the State of Illinois, WILLIAM CHAMBERLAIN, Secretary of State of the State of Illinois, and JAMES H. GATELY, WILLIAM L. McFETRIDGE, JACOB M. ARVEY, JOHN LEVIN and JOSEPH L. GILL, Commissioners of the Chicago Park District, a municipal corporation, and UNITED STATES STEEL CORPORATION, Intervenor,

Defendants-Appellees.

On Appeal From The
Supreme Court of Illinois.

MOTION TO DISMISS ON BEHALF OF UNITED STATES STEEL CORPORATION

Appellee United States Steel Corporation moves that the Court dismiss this appeal. The judgments of the Supreme Court of Illinois were based solely on state law

grounds. The supposed federal questions sought to be reviewed were not properly raised or expressly passed on below.

JURISDICTION

The jurisdiction of this Court was invoked under 28 U.S.C. § 1257(2). Jurisdiction fails at the threshold, however.

No order or opinion by any of the courts below—including the dissenting opinion filed by one of the Illinois Supreme Court judges—treated with any issue of federal law whatever. (See this Motion, 15-16.)

In the Illinois courts, the appellant never at any time made a claim that the Illinois statutory or decisional law on a taxpayer's standing to sue denied him equal protection. (See this Motion, 17-20.) He made no mention of federal due process or of any specific federal due process theory, not even in his second Petition for Rehearing after the final opinion of the Illinois Supreme Court. (See this Motion, 17-20.)

In the courts below, the appellant relied *expressly and solely on state law theories.* He contended that the Illinois legislature had no power to enact the legislation in question, Illinois S.B. 782, because it violated (1) the basic public trust doctrine of Illinois* pertaining to submerged lands

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* The public trust doctrine is expressed by the Illinois Supreme Court in the instant case (J. S. 3a) as follows:

> "It was well settled, prior to the constitution of 1870, that subject to the paramount power of the Federal government over commerce, including navigation, title to the lands submerged by the waters of Lake Michigan lying within the boundaries of Illinois rested in the State of Illinois in trust to protect the rights of the public in the use of those navigable waters for fishing, boating, recreation and other public purposes.

as applied by prior Illinois court decisions, and (2) various clauses of the Illinois Constitution, particularly Article IV, Section 22, which prohibits certain categories of special legislation. Throughout his briefs and arguments he emphasized that Illinois was free to adopt its own doctrines concerning submerged lake front land because this is "a question of local law with regard to which the decisions of the state courts are conclusive". (R. 62:25.)

Now, searching for a federal question, he relies upon certain language in *Illinois Central Railroad* v. *Illinois* (146 U.S. 387), the *Lake Front* case. But in the courts below he distinguished that case and argued that the Illinois courts had "expressly repudiated" the *Lake Front* case. (R. 62:26.) He is precluded from changing theories to create jurisdiction at this point. (E.g., *Dewey* v. *Des Moines,* 173 U.S. 193, 197-198.)

Moreover, his new claim of *denial* of supposed federal equal protection rights should be pursued by certiorari under 28 U.S.C. §1257(3), and not by appeal. (E.g., *Hanson* v. *Denckla,* 357 U.S. 235, 244.) Aside from being unfounded and untimely, the appellant's claim that the state's requirement of standing to sue denies him equal

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* (Continued)

This did not mean, however, that the shoreline was required forever to remain unchanged except by natural causes. An equally important part of the doctrine was that the State might from time to time relinquish its trust as to specific parcels of submerged lands by action of the General Assembly in granting to a shore owner title to those lands adjacent to his property *where the grant was in aid of commerce and where the public interest in the lands and waters remaining was not substantially impaired. Illinois Central Railroad Co.* v. *Illinois,* 146 U. S. 387, 36 L. Ed. 1018, and authorities cited." (Emphasis added.)

protection is not a claim which has anything to do with the validity or invalidity of S.B. 782, the Illinois act challenged here. This supposed denial of equal protection to the appellant is not a challenge to the validity of S.B. 782. It is not a challenge *to the statute* as against which the validity of the statute has been sustained within the meaning of 28 U.S.C. § 1257(2). The equal protection claim is plainly a matter to be considered under 28 U.S.C. § 1257(3) and the standards applicable to certiorari. (E.g., Rule 19.) See *Hickey* v. *Illinois Central Railroad* (278 F. 2d 529, *cert. den.* 364 U.S. 918), a recent case involving Chicago lake front property subject to the public trust doctrine, where the Seventh Circuit denied taxpayer plaintiffs standing to sue, and concluded "the case is not within the jurisdiction of the federal courts." (278 F.2d 529, 532.)

QUESTIONS PRESENTED

1. Does state law or federal law govern a state's exercise of power to dispose of state-owned submerged land by legislation which the state courts have found to be in compliance with the public trust doctrine?

2. Do the Illinois rules regarding a taxpayer's standing to sue deny equal protection to the appellant on this record, where the state courts ruled on the merits of the appellant's substantive contentions which involved only matters of state law?

3. Were the appellant's supposed federal questions properly raised or expressly passed on below?

ARGUMENT

I. The Courts Below Decided No Federal Questions.

A. The Appellant's Reliance Upon The Lake Front Case Is Flatly Contrary To His Theory Below.

In the trial court and in the Illinois Supreme Court the appellant did not base his public trust argument on the *Lake Front* case (*Illinois Central Railroad* v. *Illinois,* 146 U.S. 387), or upon federal law. There he relied upon an Illinois Supreme Court decision (*Illinois Central Railroad* v. *Chicago,* 173 Ill. 471, *aff'd* 176 U.S. 646) decided under state law. He argued that the rationale of this Court's *Lake Front* decision had been "expressly rejected" by the Illinois court. (R. 62:6.) He argued that the Illinois decision "threw off the inadequately expressed rules of the past". (R. 62:29.) He urged that subsequent federal decisions and decisions of other state courts should not be considered by the Illinois courts.

Thus, at page 25 of his Main Brief in the Illinois Supreme Court (R. 62:25), the appellant said:

> "It should be carefully noted that the Illinois Supreme Court, in the case of *Illinois Central R.R. Co.* v. *City of Chicago,* 173 Ill. 471, was clearly free to adopt and modify the general rules expressed by the United States Supreme Court in 146 U.S. 387 [the *Lake Front* decision], because the United States Supreme Court had there simply been stating common law rules applicable to the bed or soil of navigable waters and tidal waters. (146 U.S., at pp. 452, 457-459.) The question of the special attributes of the custodianship of the State of Illinois over its title to all the lands under Lake Michigan (whether navigable or tidal, or not) was expressly determined by the United States

Supreme Court, in affirming the Illinois Court's decision in *Illinois Central R.R. Co.* v. *City of Chicago* (173 Ill. 471), to be

> 'a question of local law with regard to which the decisions of the state courts are conclusive.' *(Illinois Central R.R. Co.* v. *City of Chicago,* 176 U.S. 646, 659 (1900).)"

In further support of his argument that the issue was one of local law, the appellant followed this quotation from his Main Brief below by citing *Shively* v. *Bowlby* (152 U.S. 1, 26), where this Court said:

> "The foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject, but that each State has dealt with the lands under the tidewaters within its own borders* according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another."

The appellant then pressed the point further, going on to state, at pages 25-26 of his Main Brief (R. 62:25-26) that:

> "In *Revell* v. *People,* 177 Ill. 468 (1899), the Illinois Supreme Court again expressly recognized and took advantage of the fact that *rules respecting private rights in submerged Lake Michigan lands are completely the subject of local law* and there expressly

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* It is the "settled law in this country" that the interest of Illinois in Lake Michigan submerged land within its borders is the same as a coastal state's interest in tidelands within its borders along the seacoast. "The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes." (The *Lake Front* case, 146 U.S. 387, 435; accord, *People* v. *Kirk,* 162 Ill. 138, 147.)

> repudiated another 'general' common law rule stated by the United States Supreme Court in 146 U.S. 387, 446, 464, namely, the right (which riparian owners have in certain other States) to build out wharves and docks. (177 Ill. at pp. 486-489.)" (Emphasis added.)

The appellant construed the Illinois public trust doctrine as "a more stringent local rule for the State of Illinois." (R. 62:26.) He then tried to construe this local rule as wholly denying the Illinois legislature power to make *any* disposition of submerged Lake Michigan land to a private owner as provided in S.B. 782. But this erroneous construction of the Illinois decisions, which he said was his "Theory of the Case" on his appeal below (R. 62:5), was succinctly and correctly disposed of by the Illinois Supreme Court in its final opinion. (J. S. 5a.)

B. State law Governs The Validity Of A Legislative Disposition Of A State's Submerged Lands.

The appellant concedes that there is no controlling federal law by virtue of "retained federal ownership or claim" to submerged lands along the shore of Lake Michigan within the State of Illinois. (J. S. 7.) The "federal law" which he advances is said to be the historic public trust doctrine, applicable to such submerged lands. The *Lake Front* decision, which expounds the public trust doctrine, is said to create a body of federal submerged land law. But that decision created no body of federal land law for the Great Lakes, as any careful reading of Mr. Justice Field's majority opinion will disclose and as subsequent decisions of this Court demonstrate.

The *Lake Front* decision holds that Illinois owns the submerged lands underlying Lake Michigan ". . . in trust for the people of the state." (146 U.S. 387, 452.) The decision further holds that in administering this trust the

state legislature only has power to make ". . . grants of parcels . . . that may afford foundations for . . . structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining." (146 U.S. 387, 452.) The decision summarizes the rationale of the distinction between valid and invalid grants as follows (146 U.S. 387, 453):

> "It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled."

Procedurally, the *Lake Front* case reached the federal courts, and came to this Court for ultimate decision, on the jurisdictional basis of the *railroad's* claim that the state's revocation of certain franchises or grants of submerged land impaired obligations of contract expressly protected by the Federal Constitution. (146 U.S. 387, 460-461.) The railroad asserted that an 1869 Act of the Illinois legislature conveyed Chicago lake front submerged land to the railroad and that a subsequent Act in 1873, by partially repealing the 1869 Act, nullified part of the conveyance and impaired the state's contract with the railroad which arose out of the 1869 Act. In the instant case, on the other hand, there has been no attempt to revoke rights granted by the legislation now in question. No issue of impairment of contract or other substantial question of federal law was raised in the courts below or presented by this appeal.

Substantively, the *Lake Front* case is most famous for its invalidation of the purported grant of the whole harbor

of a great city, as a "gross perversion of the trust." (146 U.S. 387, 454-455.) This grant, comprising more than 1,000 acres, was claimed to be a conveyance of all the submerged land lying off downtown Chicago between 12th and Randolph Streets for a distance of one mile eastward into the lake. (146 U.S. 387, 433-434.) However, the *Lake Front* decision specifically upholds more limited grants to the railroad. These consisted of reclamation for a railroad right-of-way, station grounds and yards. (146 U.S. 387, 443-448, 463-464.) The Court observed that these "cannot be regarded as such an encroachment upon the domain of the State as to require the interposition of the court for their removal or for any restraint in their use." (146 U.S. 387, 444.)

The doctrine enunciated in the *Lake Front* case, and the criteria for the valid exercise of the power of conveyance thereunder to private persons for private use, were adopted by the Illinois courts in *People* v. *Kirk*. (162 Ill. 138.) The *Kirk* decision, as a matter of state law, rejects the appellant's contentions. In *Kirk*, the Illinois court upheld legislation providing for conveyance of what is now part of Chicago's valuable Near North Side, a "large tract of land, containing 93 acres, held by the State in trust for the people [which] is taken and transferred to the adjacent shore owners, to be by them used for such purpose as they may think best, for their own personal interest." (162 Ill. 138, 148.) The legislation was valid because "the propriety or impropriety" of the legislation was for the legislature: "The question before us is not one of policy or expediency, but one of power." (162 Ill. 138, 148.)

The foregoing quotation is directly pertinent to the instant case, because the appellant offered no evidence at trial, expressly electing to rely solely upon the legal argument

that the Illinois legislature had no *power* whatever to pass S.B. 782. (J. S. 39a; R. 66:1-3.) He explicitly declined to contest the soundness of the Illinois legislature's finding (J. S. 35a) of legislative facts supporting the Bill. (J. S. 39a; R. 66:2-3.) The trial judge took care to ascertain the exact form of the appellant's theory, and made it clear for the record that the issue presented was whether, "purely as a matter of law, did the legislature —without any proof, now—have the power to do what they did." (R. 66:2.) The trial judge then said, "I don't want it presented on the theory that you were estopped from putting in any proof on either side." (R. 66:2.) And the judge was told by the appellant's counsel, "Oh, no, your honor, we are not." (R. 66:3.) The judge was assured, further, that the appellant was not "trying to pick out defects in some plan which, if there is a legal power to do it, we are satisfied with." (R. 66:1.)

Subsequent to the *Kirk* decision, in further litigation over the Illinois Central's lake front rights this Court confirmed that the public trust doctrine was one of state law. The Court observed, in *Illinois Central Railroad* v. *Chicago* (176 U.S. 646, 659), that the doctrine rested upon "the law of the State of Illinois, as laid down by the Supreme Court [of Illinois], not only in the case under consideration, but in the prior case of *People* v. *Kirk,* 162 Ill. 138. 146." Referring explicitly to the doctrine and its prior decision in the *Lake Front* case (146 U.S. 387), the Court stated (176 U.S. 646, 659):

> "This, too, is a question of local law with regard to which the decisions of the state courts are conclusive. *Packer* v. *Bird,* 137 U.S. 661; *Hardin* v. *Jordan,* 140 U.S. 371."

In the state courts the appellant here took exactly the same view. (R. 62:25.)

This Court since has repeatedly affirmed that the validity of conveyances of state-owned submerged land is governed by state law. For example, in *Port of Seattle* v. *Oregon & Washington Railroad,* (255 U.S. 56, 63), the Court speaking through Mr. Justice Brandeis held:

> "The State, being the absolute owner of the tide lands and of the waters over them, is free in conveying tide lands either to grant with them rights in the adjoining water area or to completely withhold all such rights. Whether a conveyance made by the State of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same, is a matter wholly of local law. *Shively* v. *Bowlby,* 152 U.S. 1 *Upon such questions* the provisions of the constitution and statutes of the State and *the decisions of its highest court are accepted by us as conclusive.*" (Emphasis added.)

(Accord: *Appleby* v. *New York,* 271 U.S. 364, 395-402; *United States* v. *Holt Bank,* 270 U.S. 49, 54-55, 59; *Brewer Oil Co.* v. *United States,* 260 U.S. 77, 83-85; and *Scott* v. *Lattig,* 227 U.S. 229, 242.)

C. The Illinois Courts Have Correctly Applied The State Public Trust Doctrine.

By committing the primary responsibility for the development of the Chicago lake front to the legislature, Illinois has placed the policy judgments required in the hands of the organs of government most directly responsive to the people. This is appropriate because of the balance of interests which must be resolved in connection with any lake front plans. Before there can be any disposition of submerged lakebed, under the Illinois public trust doctrine legislative action at the highest level is required upon the specific situation presented, to determine whether it is "in aid of commerce" or does not "substan-

tially impair the public interest in the lands and waters remaining." (*People* v. *Kirk,* 162 Ill. 138, 147.) This legislative determination is also subject to the check of the executive veto. In addition, the local zoning, city planning, anti-pollution, and other regulatory powers, as well as those of the Federal Government, are fully operative to assure that the use of the property is in accordance with appropriate regulations. The Illinois courts act as a final check to prevent a gross perversion of the public trust.

A *laissez-faire* approach, bestowing an inherent power upon riparian owners to reclaim adjacent lakebed, has been rejected. (*Revell* v. *People,* 177 Ill. 468; *Illinois Central Railroad* v. *Chicago,* 173 Ill. 471, *aff'd* 176 U.S. 646.) Likewise, the Illinois legislature has refused to follow the practice of other states which have adopted permissive general enabling acts. (E.g., Indiana, *Burns Anno Stat.,* §§62—701-703.)

The beneficial results of this approach are evident. While there may be honest differences of opinion as to individual projects, the over-all results have been uniquely successful. In the past 70 years most of the Chicago lake front has been converted from private ownership to public parks and facilities. Commercial and industrial uses which require deep water access, such as wharves, bulk shippers and steel mills, have been allowed on the lake front because of their obvious importance to the economy, but these uses have been confined to an area which has always been industrial and they occupy only a small part of the lake front, some 4 miles out of 22. The commercial and industrial uses are an integral part of Chicago's future. They provide employment-generating commercial and industrial activity to help sustain the appropriately more extensive lake front uses devoted to recreation and aesthetics.

The legislative action involved in the instant case complies with all prior decisions in Illinois, as the Illinois Supreme Court expressly held. (J. S. 5a-6a, 39a.) The legislative policy behind the conveyance which the appellant contests was expressed in Section 1 of S. B. 782 (J. S. 35a.):

> "the grant of submerged land contained in this Act is made in aid of commerce and will create no impairment of the public interest in the lands and waters remaining, but will instead result in the conversion of otherwise useless and unproductive submerged land into an important commercial development to the benefit of the people of the State of Illinois."

These policy judgments were adopted by the Illinois legislature with broad approval after careful deliberation. After hearings, the Bill was passed unanimously by the Illinois Senate, by a vote of 51-0. After further hearings it was passed by the Illinois House by a vote of 142-4. It was then approved by the Governor. (1963 Ill. Sess. Laws, 1229, 1231.) It also had widespread support from civic groups and the unanimous endorsement of the Chicago City Council. (R. 151:12-13 and 188:14.)

There was ample legislative justification for S.B. 782. In essence, the Bill represents good, balanced planning. It makes no change whatever in the existing patterns of use on the lake front. It strengthens the economic base of Illinois, by strengthening existing industrial uses in the area south of 79th Street. But it preserves the present uses of the lake front for park, civic and recreational uses north of 79th Street. (R. 57:121-129 and 151:12-20.)

All of the proposed fill area adjoins United States Steel's shoreline property. In this area, lying south of 79th Street, industrial expansion is wholly in accord with

historic and existing policies of the City of Chicago. The pioneer lake front plan, the famous Burnham Plan of 1909, contemplates continued use of limited portions of the Chicago lake front for industrial and port development, and specifically marks the area south of 79th Street, not for park purposes, but for industrial and port development. (See Burnham, *Plan of Chicago,* plates XLIV, L, LXIX, LXXII, and LXXIII; The Commercial Club, 1909.) Indeed, the detailed map of future development which includes the area now in question marks the specific area "Illinois Steel Co.", a corporate predecessor of United States Steel Corporation. (Burnham, *Plan of Chicago,* plate LXXII, page 65; The Commercial Club, 1909.) Subsequent civic and governmental plans for the lake front have continued the policy. These include: The Chicago Harbor Commission *Report* of 1909; *The Harbor Plan of Chicago* of 1927 by The Commercial Club of Chicago; The Chicago Plan Commission *Policy Statement on the Lakefront* of October, 1948; *The First Biennial Report* of the Chicago Regional Port District Board of February, 1953; and The Illinois-Indiana Bi-State Development and Study Commission *Report* of March, 1959. The history to 1957 is reviewed in Mayer, *The Port of Chicago,* at pages 13-23. (Chicago, U. of C. Press, 1957.)

There has been recent official confirmation of this lake front policy. In late 1964 the Chicago Department of City Planning reaffirmed this long-established policy in its major *Comprehensive Policies Plan*: "The Comprehensive Policies Plan strongly reaffirms the 1948 Chicago Plan Commission Lakefront Resolution, which declared that the entire lakefront should be used for recreational and cultural purposes, *except for the sections between Grand Avenue and Randolph Street and south of 79th Street.*" (*Basic Policies for the Comprehensive*

Plan of Chicago, 42; Department of City Planning, City of Chicago, 1964; emphasis added.)*

II. The Supposed Federal Questions Now Sought To Be Presented Were Not Properly Raised Or Passed On By The Courts Below.

A. The State Courts Considered The Case As Presenting Issues Of State Law Only.

None of the opinions of the Supreme Court of Illinois treats with any issue of federal law. (J. S. App. A.)

The appellant suggests (J. S. 13) that the Illinois Supreme Court expressly decided a federal question in that sentence of the final opinion (J. S. 6a) which alludes to "other constitutional grounds of attack on the statute in question, such as insufficiency of its title and violation of due process". But at that point of the opinion the court is concluding that it will affirm the determination made by the trial court "under the constitution and laws of Illinois" (J. S. 6a), and both of its allusions to "other constitutional grounds" plainly relate to specific, familiar provisions of the Illinois Constitution. Article IV, Section 13, of the Illinois Constitution requires formal sufficiency in the titles to legislative bills, and Article II, Section 2, is the state due process clause. The appellant had argued both in his Main Brief in the Illinois Supreme Court. (R. 62:15 and 62:56-59.) Moreover, in

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* Contrary to the appellant's unsubstantiated assertions of conflict of interest (J. S. 8-9), the vice president of United States Steel Corporation who serves on the Chicago Plan Commission—not the Department of City Planning—had nothing to do with the formulation of the Department's 1964 *Basic Policies* and has disqualified himself from participation in the Plan Commission's consideration of the implementation of the foregoing basic policies for the area of the lake front here in question.

the Illinois courts the appellant had not relied upon federal 14th Amendment due process as a ground of attack. (See this Motion, 17-20.)

Therefore, the Illinois Supreme Court's general allusion to "other constitutional grounds" is rightly within the rule that, if a state statute is challenged as "unconstitutional", it will be assumed that reference is being made to the state constitution. Where, as here, the state constitution has a due process clause, a general claim that "due process" has been violated will be deemed to relate to the state provision. (E.g., *Bowe* v. *Scott,* 233 U.S. 658, 664-665.)

It is most revealing that the dissenting opinion (J. S. 9a-19a), also found no federal issue. No intimation of a federal question appears in the dissenting opinion.

The trial courts also clearly did not pass on a federal question. The final order in the common law taxpayer's suit (J. S. 39a) is explicit about what was presented and decided:

> "The Court finds, as a matter of law that *under the Constitution and laws of Illinois,* including Article IV, Section 22 of the Illinois Constitution, that the Legislature had the power to pass the legislation in question, and that the Act of June 26, 1963 is valid." (Emphasis added.)

In the statutory taxpayer's action, the trial court's order again contains no indication that a federal question was considered (J. S. 38a), although the appellant was obliged to preserve explicitly any federal constitutional issues sought to be presented on appeal. (E. g., *New York Central Railroad* v. *New York,* 186 U. S. 269, 272-273; *Seno* v. *Franke,* 20 Ill. 2d 70, 73-74.)

B. The Appellant Never Raised Federal Questions In The Courts Below.

Neither the trial nor reviewing Illinois courts considered any federal questions because the appellant never raised one at any stage of the proceedings. He now urges questions of due process and equal protection under the 14th Amendment (J. S. 4-5), questions which he implies were raised by him below. (J. S. 12-15.) It is revealing, however, that he does not document the manner in which he actually presented his federal questions in the state courts. (See J. S. 12-15; contrast this Court's Rule 15 (1) (d).) In fact, the supposedly specific references to federal 14th Amendment due process and equal protection were inserted for the first time in his Jurisdictional Statement, as a look at the record will show. (Compare J. S. 12-14 with R. 62:8, 64:3, 209:13-14.)

The appellant never made a claim below, at any time, that the Illinois rules on standing to sue denied him equal protection, one of the principal federal questions he now poses. (J. S. 5, 15-19.)

The appellant suggests that his lack of standing as a taxpayer was an "unexpected procedural result." (J. S. 18.) But motions raising his lack of standing were the first responsive pleadings filed in the trial court. (R. 64: 15-22.) Moreover, the Illinois Supreme Court's first opinion held squarely that he had no standing to sue, citing long settled Illinois authority (J. S. 30a-34a), and in his first Petition for Rehearing, directed at that opinion, the appellant made no mention of any equal protection issue. (R. 82: 1-12.) Even his final petition for rehearing made no such claim. (R. 209:1-16.)

The appellant's federal substantive due process contentions stand on no better footing. He made no mention

of the 14th Amendment in his complaints (R. 46 and 64: 2-12.) And on appeal he did not refer to the 14th Amendment due process clause, or articulate any federal due process theory, or cite any federal substantive due process authorities (R. 44, 62, 74, 82, 89, 180, 209), not even in his final Petition for Rehearing. (R. 209: 1-16.)

In all of the appellant's briefs and pleadings in the state courts up to the final decision of the Illinois Supreme Court, there are exactly two brief allusions to the Federal Constitution and they are inadequate to preserve any federal constitutional question for review, both under the Illinois procedure and the practice of this Court.

The first of those allusions came in an early paragraph of the appellant's complaints where he alleged the capacity in which he was suing and the relief sought. There he made a general reference to "the constitutions, statutes, and laws of the United States and of the State of Illinois." (R. 64:3.) No more specific identification was made of any particular provision of the Federal Constitution or theory arising thereunder. (R. 64:2-12.)

Under Illinois procedure, constitutional challenges must be made in the trial court, and they must be made with specificity. (E. g., *Biggs* v. *Cummins,* 5 Ill. 2d 512, 516; *Seno* v. *Franke,* 20 Ill. 2d 70, 73-74.) "The particular respect in which the statute violates some constitutional limitation must be pointed out." (*Biggs* v. *Cummins,* 5 Ill. 2d 512, 516.) This Court imposes similar requirements of specificity (Rule 15 (1) (d)), and enforces state procedural requirements designed to secure a clear and timely presentation of federal constitutional challenges. (E.g., *Pennsylvania Railroad* v. *Illinois Brick Co.,* 297 U. S. 447, 462-463.) A mere general allusion to the "constitution, statutes and laws" is insufficient.

The appellant's second allusion to the Federal Constitution came at Page 8 of his Main Brief. (R. 62:8.) There the reference was as follows:

> "The underlying substantive doctrine that Lake Michigan lands are held in trust for the public is a part of the *basic law of this State,* and breach of that trust, as here alleged, involves questions arising under Article II, Section 2 of the Illinois Constitution, the XIVth Amendment to the Constitution of the United States; Article II, Section 14 of the Illinois Constitution, and Article IV, Section 22 of the Illinois Constitution, and Article IV, Section 13 of the Illinois Constitution." (Emphasis added.)

No further mention of the Federal Constitution or argument thereunder was made. The appellant's first "federal" theory (based on the *Lake Front* case, not on the 14th Amendment due process or equal protection clauses; R. 209:13-14) came in his second Petition for Rehearing *after* the final decision of the Illinois Supreme Court and in violation of Rule 39 of the state court* and of this Court's requirements. (Ill. Rev. Stat., ch. 110, §101.39; *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 128.)

Rule 28-1 (B) of the Supreme Court of Illinois requires that on appeal to that court, if the case involves "a question arising under the Constitution of the United States", then "the appellant's brief shall contain not only the jurisdictional statement preceding the Points and Authorities required by Rule 39, but as the first point in the Argument, a complete argument of the constitutional question." The "complete argument" required

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* Illinois Supreme Court Rule 39 in part provides: "No alleged error or point not contained in the [main] brief shall be raised afterwards . . . on petition for rehearing."

by Illinois Rule 28-1 (B) was nowhere made. The Federal Constitution was not mentioned further in the first point or any other point of the appellant's argument. (R. 62: 9-65.) He did not cite one federal due process or equal protection authority in his briefs or argument. (R. 44, 62, 74, 82, 89, 180, 209.)

III. The Illinois Rules Regarding A Taxpayer's Standing To Sue Have Not Been Applied To Deny Equal Protection To The Appellant.

The equal protection argument which the appellant makes here, but never presented below (see this Motion, 17-20), ignores the realities of the state court proceedings and of the Illinois law of standing to sue. The appellant says that the Illinois Supreme Court's alternative holding on the standing issue denied him equal protection. His reasons for claiming such a denial are without merit.

First, the Illinois Supreme Court did not "prevent a review of its decision" (J. S. 18) on the substantive issues presented to it. In fact, the Illinois courts *decided* the issues *on the merits,* for the Illinois Supreme Court held (J. S. 6a):

> "The trial court determined that under the constitution and laws of Illinois, including §22 of Article IV of the Illinois constitution, the legislature had the power to pass the legislation in question, and that the act of June 26, 1963, is valid. We conclude that this determination of the trial court is correct."

The appellant concedes this (J. S. 1, 6), as does the dissenting Illinois Supreme Court judge in the first sentence of his opinion. (J. S. 9a.) If the appellant had not lost on the merits, he would not have directed the bulk of his Jurisdictional Statement at the merits of the result below.

Second, the Illinois courts have not used standing as a device "to prevent this Court from correcting the virtual nullification of federal law." (J. S. 16.) In fact, the issues on the merits raise questions of state, not federal law. (See this Motion, 7-11.) The courts below *did* decide the issues of substantive law on the merits. They cannot be accused of evading review merely because those issues were not federal issues.

Third, the suggestion that the final action of the state Supreme Court was "unexpected" (J. S. 18), when it ren dered an alternative holding against the appellant's claims of standing, is demonstrably incorrect. The question of standing was in the case from the earliest stages in the trial court. (R. 64: 15-22.) On appeal, the first opinion of the Supreme Court was devoted exclusively to the appellant's lack of standing (J. S. 30a-34a), and the issue expressly remained in the case throughout the rehearings. (R. 132:5-7, 134:13, 209:12-13.)

Fourth, the result on the standing issue was hardly "unexpectable". On the contrary, it was completely consistent with settled Illinois equity practice. The Illinois precedents governing a taxpayer's lack of standing to challenge dispositions of property, as distinguished from money, are well established. The holdings of *Koehler* v. *A Century of Progress, Inc.,* (354 Ill. 347) and *McCormick* v. *Chicago Yacht Club* (331 Ill. 514, 521-522) were adverse to the appellant and were announced in cases involving lake front property. Moreover, the plain language of the Illinois Public Moneys Act (Ill. Rev. Stat., ch. 102, §§ 11, 12), which extends standing only to taxpayers' challenges to "disbursement of public funds" and "disbursement of public moneys", was opposed to the appellant's standing. Finally, the fact that United States Steel Corporation was a party certainly did not relax the equity rules as to

standing. The *Yacht Club* decision (331 Ill. 514, 521-522), involving private litigants, confirms this. (Contrast J. S. 18.)

Fifth, an examination of the historical development of this aspect of the Illinois law of standing can fairly arouse no suspicion that it has been developed as an "arbitrary discrimination" (J. S. 17) to frustrate the assertion of federally protected rights. (See the opinion below, J. S. 6a-15a.) The dissenting opinion in the Illinois Supreme Court especially confirms this, for it contains no hint of any federal infirmity in the Illinois law of standing. (J. S. 9a-15a.) On the record in this case any such claim is frivolous. In fact, the appellant has raised no federal right which he has been precluded from asserting under the Illinois law of standing. (See this Motion, 7-11.)

IV. The Appellant's Unfounded Assertions Outside The Record Do Not Create Substantial Questions For This Court.

The appellant should address himself to the legal issues, rather than make undocumented and unfounded appeals to emotion and prejudice in the guise of an argument that "the questions are substantial." (J. S. 19-21.) Such appeals do not create substantial federal questions properly presented to this Court, and they contribute nothing to the sound resolution of the issues presented by this appeal.

The appellant does no service to this Court by inaccurately suggesting that this case involves "industrial despoilation of our major natural waterways"—when the fact is that the responsible policy making and planning authorities have weighed and approved the project in question, and it will be subject to full regulation under all

pertinent local, state and federal laws. Or by informing the Court that there are "no limits on the power of industry" under the public trust doctrine as applied below—when the fact is the state courts do impose limits, the same limits used by this Court in the *Lake Front* case, and when industry plays only a very limited role in the Chicago lake front plan, which has 18 of the 22 miles of lake front dedicated to public uses. Or by suggesting that the public is "outmaneuvered by the special interest pleaders," "without a forum"—when the fact is that legislative hearings were held at the local and state levels on the law in question, the legislation was duly approved by the legislature and Governor, and the appellant has had his contentions thoroughly considered by the courts of Illinois.

The appellant would have the Court believe that there is a need which only the courts can fill—indeed now only this Court, since he lost on the merits below. But the courts cannot create, finance and run a park. The courts cannot develop the economy of a region, or initiate measures to promote jobs. The courts cannot strike the proper balance between such programs—the balance desired by the people. The legislative and executive departments of the government must carry out such programs.

Because he disagrees with the policy adopted by the duly constituted policy making bodies, the appellant would interject this Court into the policy making process. That is precisely what he seeks—for he says the Illinois legislation in question is invalid, yet he expressly elected (J. S. 39a; R. 66:1-3) to offer no evidence to rebut the legislative policy established by S.B. 782 (J.S. 35a), a legislative judgment which has ample justification. (R. 57:121-129 and 151:12-20.) It is contrary to fundamental prin-

ciples of the separation of powers and representative government to allow any individual to thwart the people and their elected government, under the guise of invoking judicially the "true meaning" of an undefined protective doctrine "such as only the United States Supreme Court can provide." (Compare J. S. 20-21.) This would be a "judicial trespass on the legislative function," as the Third Circuit put it in a recent Virgin Islands case involving a grant of more than 1,200 acres which was attacked upon the same theories as the appellant now urges. (*Smith* v. *Virgin Islands,* 329 F. 2d 135, 144, *cert. den.* 377 U.S. 979.)

CONCLUSION

This appeal presents no federal questions whatever. The appellant should not be permitted to invoke the jurisdiction of the Court upon a theory completely contrary to that which he asserted throughout protracted litigation in the courts of Illinois.

The state courts decided the case on state law grounds. The public trust doctrine, applied in the *Lake Front* decision and many other cases, "is a question of local law with regard to which the decisions of the state courts are conclusive." (*Illinois Central Railroad* v. *Chicago,* 176 U.S. 646, 659.) The Illinois procedural requirements of standing to sue in taxpayers' suits are also requirements of state law, and they were not applied to deny equal protection to the appellant taxpayer or to evade federal law. In this case the appellant received a determination on the merits of his supposed "federal" issue—the application of the public trust doctrine—which is really "a question of local law," not federal law.

These are the matters properly before this Court, and they plainly present no federal question of substance. We respectfully submit that this appeal should be dismissed and that the appellant's alternative prayer for certiorari should be denied.

Respectfully submitted,

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